

The Honorable Robert S. Lasnik

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GEORGE PRUE,

Plaintiff,

v.

UNIVERSITY OF WASHINGTON,

Defendant.

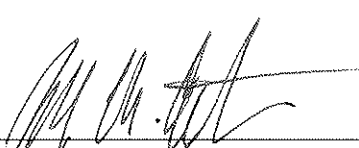
Case No.: C07-1859 RSL

JOINT STATEMENT OF DISPUTED
INSTRUCTION NO. 12

Respectfully submitted this 28th day of May, 2009.

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By:


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By: Jayne L. Freeman (per email)
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DISPUTED JURY INSTRUCTION NO. 12

MOTIVATING FACTOR - DEFINITION

(Plaintiff's Proposed)

A motivating factor is a factor that played a role in the employer's decision.

Source: *Browning v. USA*, No. 07-35557 (9th Cir. May 22, 2009)
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)

"Motivating factor" is the operative legal standard for determining liability under Mr. Prue's federal discrimination claims. The meaning of this term is not self-evident. The parties have submitted a joint purposed instruction defining "substantial factor," the operative standard for liability under Mr. Prue's state law claims. The jury should also be instructed on the definition of "motivating factor." In *Browning*, the same trial court that found it unnecessary to give a pretext instruction, found it necessary to give a "motivating factor" instruction.

Defendant's Position

The current elements instructions are based on 9th circuit pattern instructions (11.1C and 10.1A) that do not include this additional language, despite language that already existed from *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) (plurality opinion)(A motivating factor is a factor that "played a part in the employment decision."). These model instructions are sufficient.

In *Browning v. USA*, No. 07-35557(May 22, 2009), the Ninth Circuit did not approve or reject a definitional instruction regarding "motivating factor"; it merely acknowledged that the District Court below in that case had "defined 'motivating factor' as 'a factor that played a role in the decisions' of Candanoza or Ayotte." If such a definition were given it should refer to "employment decision" (as in *Price Waterhouse*) or "the employment decisions of _____[identified employees of Defendant] (as in *Browning*) as opposed to "the employer's decision."

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2009, I caused to be electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Jayne L. Freeman
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Dated: May 28, 2009

/s/ Jill Potter
JILL POTTER